Petition

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81 -NO. 23

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ALBERT GUARINERI and ANN MARIE GUARINERI,

Petitioners,

v.

UNITED STATES OF AMERICA, UNITED STATES PAROLE COMMISSION, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

James S. Falletta
FABER & FALLETTA
101-15 Metropolitan Avenue
Forest Hills, New York 11375
(212) 520-1900

Counsel for Petitioners

(11164)

QUESTIONS PRESENTED

This is a controversy arising from a Federal Tort Claim wherein Summons and Complaint were dismissed below. The questions presented are:

1. Should the complaint be dismissed for failure to file the appropriate administrative claim within two years, when the agencies had notice of the action and the underlying facts within the two year limitation period?

2. Is there authority to support a claim for damages under Federal Tort Claims Act for failure of the United States Parole Commission to supervise and control the plaintiff's assailants when they were released from prison on parole?

(See next page for Interested Parties.)

INTERESTED PARTIES

THE SOLICITOR GENERAL OF THE UNITED STATES

EDWARD R. KORMAN,
UNITED STATES ATTORNEY, EASTERN DISTRICT OF NEW YORK.

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18 U.S.C. § 4203
18 U.S.C. § 4209
28 C.F.R. § 2.38
S. Rep. No. 1327, 89 Cong. 2d Sess.
S. Rep. H.R. 13650
U.S. Code Cong. & Ad News 2515, 2516

The petitioners, Albert and Ann Marie Guarineri respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in

this case on April 22, 1981. (Court of Appeals decision and judgment, infra, p. A1-4).

OPINIONS BELOW

There is no formal opinion of the District Court. Excerpts of the transcript in that Court, including the complete judge's statement on granting the defendants' motion to dismiss the plaintiffs' cause, are reproduced in Appendix A11 to A18 to this petition.

The opinion of the Court of Appeals has not yet been reported. The opinion and judgment of that Court is reproduced in Appendix A1 to A4 to this Petition.

JURISDICTION

The Judgment of the Court of Appeals was entered in April 22, 1981. The jurisdiction of this Court rests on 28 U.S.C. section1254 (1).

STATUTORY PROVISIONS INVOLVED

The relevant portions of the Federal Tort Claims Act: 28 U.S.C. § 2675 (a) 1980, and 28 U.S.C. § 2401 (b) provide that before an action can be instituted upon a claim, the claimant must first present the claim to the appropriate Federal agency, the prospective plaintiff has two years from accrual of the cause of action to present his claim to the agency.

28 U.S.C. § 2401 (b) imposes a two-year statute of limitations upon plaintiff within which to commence action.

Under 28 U.S.C. Sections 1346, 2674, (amended 1976) the United States is liable in damages for tort claims.

28 U.S.C. 2680 (a) which states that a Federal Tort Claim is barred if the claim is..."based upon the exercise or

performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be ", exercise of a discretionary function is exempt and immune from suit.

STATEMENT OF THE CASE

The petitioner Albert Guarineri, a New York City Police Officer was shot on September 18, 1980 by Lloyd Nelson James and James John Johnson, Jr. They had been previously convicted, sentenced and incarcerated for federal crimes (bank robberies). At the time of the shooting they were in violation of their respective releases on federal work release programs. Those releases were granted then by United States Parole Commission.

Plaintiffs commenced their action by filing their summons and complaint with the Clerk of the United States District Court for the Eastern District of New York on August 21, 1980; service of that summons and complaint was completed by U.S. Marshal on August 22, 1980.

The plaintiffs seek to hold the defendant respondent here, United States, liable for officer Guarineri's injuries, stating that the defendant was responsible by reason of the defendant's negligence in releasing and thereafter failing to supervise and control Mr. Jones and Mr. Johnson. The respondent failed to seek out the criminals permitting them to roam in violation of the terms of their releases.

The United States moved for dismissal claiming that plaintiffs never filed an

administrative notice as required by 28 U.S.C. § 2675 within a two year period, which motion was dated October 22, 1980 and was returnable November 14, 1980.

The plaintiff by letter dated November 7, 1980 to U.S. Attorney (Appendix A 5 to A 7) offered to convert the filing and service of the complaint (August 22, 1980) on the defendants to a notice. The U.S. Attorney advised the plaintiff of the defendants' decline to such agreement unless complaint be withdrawn, letter (Appendix A 8 to A10) dated November 13, 1980...."If you wish to withdraw the complaint herein....we would naturally be happy to enter into such a stipulation."

After some discussion, affidavit was submitted by plaintiff and case was heard by Judge Bramwell at the District Court on January 9, 1981. Judge Bramwell granted the defendants' motion dismissing

the complaint. From that judgment entered the 22nd day of January, 1981 plaintiffs timely appealed to the U.S. Court of Appeals for the Second Circuit. On April 22, 1981 that court affirmed the decision of the District Court. (Appendix A 1 to A4)

REASONS FOR GRANTING THE WRIT

I

The filing and service of the complaint was sufficient to satisfy the administrative claim requirement, as it notified the agency of the underlying facts and was not inconsistent with the purposes of the Act. The complaint should be deemed to toll the two year statutory period.

The Federal Tort Claims Act provides that before an action can be instituted upon a claim, the claimant must first present the claim to the appropriate federal

agency. 28 U.S.C. § 2675 (a) (1980). The prospective plaintiff has two years from the accrual of the cause of action to present his claim to the agency. 28 U.S.C. § 2401 (b) (1980). It is the plaintiff's contention that the filing and service of a complaint and summons satisfied the administrative claim requirement, and as it was made within two years of the shooting, allows for a refiling of the complaint after final agency determination. Such a holding would be most equitable under the circumstances and in no manner prejudice the government nor offend the purposes of the Tort Claims Act.

In determining whether a complaint can serve as the notice of claim to a federal agency, the starting point must be the legislative history of the Federal Tort Claims Act. It has been stated in

Eck v. United Arab Airlines, Inc., 360 F. 2d 804 (2d Cir. 1966), a court faced with this problem of interpretation,..., can well begin with an inquiry into the purpose of the provision that requires interpretation. The language of the provision that is to be interpreted is, of course, highly relevant to this inquiry but it should never become a "verbal prison." Sullivan v. Behimer, 363 U.S. 355, 358, 80 S. Ct. 1084, 4 L.Ed. 2d 1254 (1960). In Ocean Drilling & Exploration Co. v. United States, 600 F. 2d 1343, 1347 (Ct. Cl. 1979), where the court pointed out that "no matter how clear the statute may appear on its face, there is certainly no rule of law forbidding a court from resorting to the purpose and legislative history of a statute to determine the intent of Congress in enacting the statute."

After stating that the provisions in question here have the "common purpose of providing for more fair and equitable treatment of private individuals...when they deal with the government," the Senate Report notes that the proposals embodied in H.R. 13650 are intended to ease court congestion and avoid unnecessary litigation, while making it possible for the Government to expedite the fair settlement of tort claims asserted against the United States. In accomplishing these purposes, the more expeditious procedures provided by this bill will have the effect of reducing the number of pending claims which may become stale and long delayed because of the extended time required for their consideration. S. Rep. No. 1327, 89th Cong., 2d Sess. 2, reprinted in (1966) U.S. Code Cong. & Ad. News 2515, 2516. After reciting the same language

from the legislative history, the court in Van Fossen v. United States, 430 F. Supp. 1017 (N.D. Cal. 1977), made the following insightful comments: "Clearly, the intent behind the amendment is to ease court congestion and speed the decision making process through the settlement or meritorious claims prior to trial. This 'more expeditious procedure' is meant to benefit claimants and in no way is designed to preclude them from their day in court. The hope is to postpone that court appearance to enhance the likelihood of settlement on the merits."

II

Simply stated, consideration of the summons and complaint as the administrative claim will not defeat that intent, under the circumstances of this case.

Now that two years have elapsed

since the shooting, dismissing the action for failure to file an administrative claim would preclude the plaintiff from his day in court. The defendant refused to accept the plaintiff's offer to stipulate to the notice, after the time period was beyond the statutory two years. The fundamental issue here is that there being authority and intention granted for the statute to give equitable treatment, this court has the complete authority to decide the quality of notice in this particular case. The law must promote social as well as legal justice, which can only be effected by the court.

In its motion to dismiss the complaint, the government alleges that the actions complained of were a discretionary function, and could not be the basis of liability. Thus, it is clear that the claim would not have been settled even if

it had been submitted to the federal agency.

The amount of the claim, the seriousness of the plaintiff's injury, and the government's reliance on the "discretionary function" defense clearly shows that litigation would be inevitable in this case. The government has not been precluded from making an offer of settlement, and denominating the complaint as the administrative claim does not create court congestion nor foster unnecessary litigation. Nor does the present situation present the risk that stale claims will surprise the government.

III

As the complaint was filed within the two year period, all parties were put on sufficient notice as to the relevant facts.

The question here is one of evident importance. The United States receives

notice within the mandatory period, two years August 22, 1980...the statute would have run on September 18, 1980...28 days passed with no action by the United States. Rhetorically, does this court condone such sharp practices? We, the petitioners think not.

The actions of the plaintiff in the present case do not offend the purposes of the "administrative exhaustion" provisions, it is also important to note that the statutes require a written claim to be presented to the agency, there is no specific form required, only such that the agency can begin an investigation into the facts of the case. The government has not claimed that the information contained in the complaint is insufficient, or inadequate to put the agency on notice. The plaintiff should not be penalized merely because the claim was in the form of a

complaint, rather than a traditional form. In Mack v. United States Postal Service, 414 F. Supp. 504 (E.D. Mich. 1976), the plaintiff merely filed repair estimates for damage done to his automobile. Denying the government's motion to dismiss for failure to present a claim within the meaning of the statute, the court pointed out that: While it is true that the estimates alone would not constitute a complete record for the purposes of deciding plaintiff's claim, they did provide sufficient notice of the nature of the damage to permit further administrative fact finding.

We are persuaded that plaintiff here has complied with the procedure for filing a claim. The complaint was perhaps the most complete and best means of giving the agency "sufficient notice of the nature of the damage."

Although the administrative exhaustion requirements are couched in absolute terms, courts have not been "straitjacketed" by the statute when dismissal is suggested because of a technical infraction. Although 28 U.S.C. § 2401 and 2675 specifically provide that the action cannot be instituted until there is a final decision on the claim, or after six months, the court in McCormick v. Cooley, 458 F. Supp. 776 (W.D. Pa. 1978) upheld an action filed prematurely. In denying the motion to dismiss, the court stated: We recognize that § 2675(a) prerequisites are jurisdictional requirements to maintaining a suit. Rosario v. American Export-Isbrandtsen Lines, Inc., 531 F. 2d 1227, 1231 (3d Cir.) cert. denied sub nom. Rosario v. United States, 429 U.S. 857, 97 S. Ct. 156, 50 L.Ed 2d 135 (1976).

However, since the six months of agency inaction has not elapsed, and no "substantial progress" has been made in this case, the jurisdictional defect may be considered cured without the necessity of plaintiffs' refiling the suit.

If the complaint can be considered as the administrative claim, the plaintiff can easily refile the action if the claim is denied or after six months of inaction. The defendant would not be prejudiced and the plaintiff would be afforded his day in court.

IV

If the complaint is insufficient to constitute an administrative claim, it must be viewed as sufficient to toll the running of the statute of limitation.

The United States Supreme Court has recognized that circumstances may dictate the tolling of a limitation period: These

cases fully support the conclusion that the mere fact that a federal statute providing for substantive liability also sets a time limitation upon the institution of suit does not restrict the power of the federal courts to hold that the statute of limitations is tolled under certain circumstances not inconsistent with the legislative purpose. American Pipe & Construction Co. v. Utah, 414 U.S. 538, 559 (1973). A tolling of the two year statute of limitations would "validate" any subsequent notice filed with the agency. The dismissal of the complaint would not bar a subsequent maintenance of the suit after the administrative remedies were exhausted. Price v. United States, 466 F. Supp. 315 (E.D. Pa. 1979)

In Apollo v. United States, 451 F. Supp. 137 (M.D. Pa. 1978), the plaintiff

filed a claim exactly two years after accrual, which was defective in that it failed to make a claim for a sum certain. An attempt to amend the defect some ten weeks later elicited a motion to dismiss by the government to which the court responded:

> The technical defect in the administrative claim as first presented by plaintiff was the failure to include a sum certain in the claim. However, plaintiff's claim was first presented within the two years, and plaintiff made a prompt correction of the technical omission when the amended notice was filed about 10 weeks later. Consequently, the District Counsel for the BA had ample opportunity during the next five and one-half months for consideration of plaintiff's technically complete claim. See Hunter, 417 F. Supp. at 272; Little v. United States, 317 F. Supp. 8 (E.D. Pa. 1970). Since plaintiff filed the claim within the applicable two-year period and corrected the technical defect so that the claim included a sum certain, defendant's jurisdictional contention must be rejected.

In effect, the defective claim was held

to have tolled the statute until a claim in its proper form could be submitted. As adequate notice was given by the complaint in the present case, it too should be held to toll the statute.

Again resort to the legislative history of the exhaustion requirements proves enlightening:

> The requirement of an administrative claims (sic) as a prerequisite to suit has numerous precedents in statutes governing tort claims against municipalities. These laws often provide that a municipality must be given notice of an accident within a fixed time. The purpose of this notice has been summarized as being -- "* * * to protect the municipality from the expense of needless litigation, give it an opportunity for investigation, and allow it to adjust differences and settle claims without suit (McQuillin, Municipal Corporations (3d ed.), section 53.153)."

The analogy with notice statutes for municipalities is not without significance, as an increasing number of jurisdictions are holding that actual,

rather than written, notice is sufficient, or that it at least tolls the statute of limitation. The District of Columbia is one such jurisdiction. See Pitts v. District of Columbia, 391 A. 2d 803 (D.C. 1978) (District had actual notice of accident and injury so that statute's requirement of notice to mayor was met). In New York a failure to file a timely claim is excused when, within the statutory period, the city had actual notice of the accident. Wade v. City of New York, 65 App. Div. 2d 534, 409 N.Y.S. 2d 404 (1978)

The filing of the complaint, in this action gave actual notice to the defendant of the plaintiff petitioners claim, it should be found to accomplish the statutory purpose to "furnish timely notice so that the defendant could investigate the claim". Thus, the

complaint in the present case accomplished the statutory purpose of the Act. So that justice is done to all involved, the complaint should be considered an adequate administrative claim, or, alternatively, it should be deemed sufficient to toll the statute of limitations.

V

Statutorily, the United States Parole Commission is charged with responsibility for implementation of a national parole policy which is reasonable in protecting the public welfare.

Thus, by regulation, United States Probation Officers are delegated the responsibility to provide supervision to persons released on parole. Having undertaken such supervision of the assailants in the present case, the probation officers were obligated to use

due care to protect the public, and failing in that duty, the United States is liable under the Federal Tort Claims Act for negligence.

The injury suffered by the plaintiff was a proximate result of the failure of United States Probation Officers properly to supervise and control the assailants, who, at the time in question, were parolees from federal prison. Therefore, under 28 U.S.C. § 1346, 2674 (as amended 1976), the United States is liable in damages for this tort claim in the same manner and to the same extent as a private individual in the same or similar circumstances under state law. See Aretz v. United States, 604 F 2d 417 (5th Cir. 1979).

When the United States Parole Commission released the assailants as parolees, it had, and exercised, the

power to request probation officers to perform duties "for maintaining proper supervision of and assistance to such parolees...." 18 U.S.C. § 4203 (1976). Likewise, the Commission had the authority in exercising its responsibility to "Provide for such supervision and other limitations as (were) reasonable to protect the public welfare." 18 U.S.C. § 4209 (1976). The implementation of this community supervision is the operational responsibility of the United States Probation Officers. 28 C.F.R. § 2.38 (as amended 1979). It is this failure of supervision and control at the operational level which has a direct causal relationship to plaintiff's injuries and which forms the basis for the government's liability under the Federal Tort Claims Act.

Pursuant to these statutory and

regulatory provisions, once the United States Probation Officers undertook the supervision and control of these parolees and engendered public reliance on such supervision and control, the officers were obligated to use due care to make certain that their activities were adequate to protect the public welfare. When the probation officers failed in their duty, and damage was thereby caused to the plaintiff, the United States became liable under the Federal Tort Claims Act. See Rayonier Inc. v. United Sates, 352 U.S. 315 (1957). In the Rayonier case, the United States Supreme Court elaborated upon its earlier ruling stating that: "the test established by the Tort Claims Act for determining the United States' liability is whether a private person would be responsible for similar negligence under the laws of the

State where the acts occurred."

Further, in Brown v. United States, 374 F. Supp. 723 (E.D. Ark. 1974) it was ruled that,

> if a duty of care with respect to an individual or class of individuals is imposed on the Government by law or is voluntarily assumed by the Government, then the duty so imposed or assumed must be discharged in a non-negligent manner.

In Swanner v. United States, 309 F. Supp. 1183 (M.D. Ala 1970), Government agents had knowledge of the danger in the plaintiff's undercover work but failed to provide him or his family with protection. The court explained that:

> It is without dispute that the United States may be liable under the Federal Tort Claims Act for its failure to provide police protection where, as here, the decision not to provide such protection is made by an agent...

The analogy to the instant case is important in that the United States Probation Officers failed to provide the

necessary protection through proper supervision and control of the parolees.

VI

By statute, the United States Parole Commission is charged with protecting the public welfare as part of its responsibility in implementing the federal parole program.

The enforcement and administration of the program with respect to supervision of individual parolees is delegated to the United States Probation Officers. Having undertaken such supervision of the assailants in the instant case, the probation officers were conducting an operational function which required the exercise of due care to protect the public. It was the failure of these officers to carry out that duty which established the government's liability under the Federal Tort Claims Act.

The often cited contrary case of Payton v. United States 468 F. Supp. 651 (S.C. Ala 1978) is a landmark decision to come under review by 5th Cir 1981 in, Payton v. United States.....F.2d....., where on appeal the Fifth Circuit reversed and remanded. Judge Fay unassailably reasoned that where a parole board by grievous error negligently releases predator parolees, it was not an action to which immunity from suit attaches, in the discretionary function exception. While that case referred to release of a prisoner in disregard of his known murderous, psychiatric warning signals it is applicable here as a proper vehicle for determining whether parole board was guilty of actionable negligence when they released the parolees.

CONCLUSION

It is respectfully submitted that petitioners' construction of the authorities in question constitute the applicable intent intertwined in the statutes and regulations and represents a rational, workable approach to remedy and render true equitable justice. It is thus important that the Supreme Court grant Certiorari in this case.

At the very least, the actions of the United States Attorney in their failure to notify the petitioners within the remaining period of time constituted a failure on their part to promulgate clear and comprehensive guideline of procedure to the petitioners.

For these and other reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted,

JAMES S. FALLETTA
101-15 Metropolitan Avenue
Forest Hills, New York 11375

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 22nd day of April, one thousand nine hundred eighty-one.

Present: HONORABLE LEONARD P. MOORE,

HONORABLE THOMAS J. MESKILL,
Circuit Judges,

HONORABLE LLOYD F. MAC MAHON,
District Judge.

- -x

ALBERT GUARINERI and ANN MARIE GUARINERI,

Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA, BUREAU OF PRISONS, UNITED STATES PAROLE COMMISSION, UNITED STATES BOARD OF PAROLE, LAW ENFORCEMENT ASSISTANCE ADMINISTRATION (JUSTICE DEPARTMENT), FEDERAL WORK RELEASE PROGRAMS NATIONAL INSTITUTE OF CORRECTIONS and ADVISORY, UNITED STATES PROBATION DEPARTMENT AND OFFICERS,

Defendants-Appellees.

- -

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

Appeal from a judgment entered in the United States District Court for the Eastern District of New York, Bramwell, J., dismissing plaintiffs' complaint for lack of subject matter jurisdiction.

This cause came on to be heard on the transcript of record from the District Court.

On August 21, 1980, Albert and Ann Marie Guarineri instituted this action against the defendants, the United States and various government agencies, by filing a complaint with the Clerk for the Eastern District. The action sought damages for injuries sustained by Albert,

a New York City police officer, when he was shot on September 18, 1978 by two recently released federal parolees. Appellants claim that the government was negligent in paroling his assailants and in failing to properly supervise them once they were paroled.

Judge Bramwell dismissed the action for lack of subject matter jurisdiction, since the plaintiffs had failed to comply with 28 U.S.C.§2675(a) (1976). This requirement is jurisdictional and non-waiverable, and such agency actions must be instituted within two years of the accrual of the plaintiffs' claim. Plaintiffs' contention that the commencement of the judicial action within the two-year period satisfied the requirement for filing a claim with the agency and acted to toll the limitations period is spurious.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is affirmed.

/s/Leonard P. Moore
Leonard P. Moore, U.S.C.J.

/s/ Thomas J. Meskill
Thomas J. Meskill, U.S.C.J.

/s/ Lloyd F. MacMahon
Lloyd F. MacMahon, U.S.D.J.

* Honorable Lloyd F. MacMahon, Chief Judge of the United States District Court for the Southern District of New York, sitting by designation.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
FILED APR 22, 1981
A. Daniel Fusaro, Clerk

FABER & FALLETTA
Attorneys at Law
101-15 Metropolitan Avenue
Forest Hills, New York 11375

November 7, 1980

Richard H. Dolan, Esq.
Assistant U.S. Attorney
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Dear Mr. Dolan:

Re: Albert & Ann Marie Guarineri
vs. U.S.A. etal Civil Action-
No. CV 80-2295

With reference to the pending motion brought by your office as against Albert Guarineri's law suit, we would propose the following in accordance with the requirements of the U.S. Code, namely that section cited by you (Page 6 Brief - 28 U.S. Code Section 2675 and additionally 28 U.S. Code 2401 Section (b)) which as you are well aware, requires notice to the appropriate agencies within two years of cause.

We would propose a stipulation withdrawing our action as against the U.S. on condition that there be an acknowledgement that the papers which were served by the U.S. Marshal's office on the following dates and persons:

> 8/21/80 Served U.S. Attorney General by Cert. Mail #P12 3730503
>
> 8/21/80 Served Bureau of Prisons, U.S. Parole Comm. by Cert. Mail #P12 3730502
>
> 8/22/80 Served U.S. Attorney office EDNY by serving Mary Cardieri authorized to accept.

be deemed the notice required for notice to the agency thereby affording the agency the appropriate amount of time to make a determination on Mr. Guarineri's claim and also afford him an appropriate amount of time to commence his service anew for it would certainly seem that; what better papers to put the agency on notice than a full and complete complaint

in lieu of notice?

Again, since the service was made well within the time of the two years by the U.S. Marshal I cannot see that anyone would be harmed or hindered by such an agreement and thus Mr. Guarineri would be submitting to an agency determination in lieu of the present court proceedings.

If this be appropriate and agreeable to you, this letter can be converted into a stipulation quite easily. In any event, I will require an extension of time with reference to your moving papers and enclose herewith a stipulation of extension.

I thank you for your consideration, and remain

Very truly yours,

/s/ James S. Falletta
James S. Falletta

jsf/mbm encls.

UNITED STATES DEPARTMENT OF JUSTICE

UNITED STATES ATTORNEY
Eastern District of New York
Federal Building
Brooklyn, N.Y. 11201

MMT:RHD:jp
F.#804,140 November 13, 1980

James S. Falletta, Esq.
Faber & Falletta
101-15 Metropolitan Avenue
Forest Hills, New York 11375

Re: Albert Guarineri et ux v.
United States Civil Action
No. CV 80-2295 (EDNY)

Dear Mr. Falletta:

With respect to the above-captioned Federal Tort Claims Act case, we relayed to the Bureau of Prisons and the United States Parole Commission your proposal to withdraw the complaint herein on condition that the complaint be accepted as plaintiff's administrative claim, with the date of service being deemed the date of the submission of plaintiff's claim to

the administrative agencies. We have been requested by the Bureau of Prisons and the United States Parole Commission to advise you that they decline to accept the complaint herein as plaintiff's administrative claim, and that they decline to deem any document as having been filed as an administrative claim until such document is actually submitted to the agency for an administrative determination.

If you wish to withdraw the complaint herein unconditionally and without prejudice, we would naturally be happy to enter into such a stipulation. If, however, you prefer to respond to the pending motion to dismiss, please contact me at 330-7967 so that we may agree on a mutually convenient return date. In that connection, please note that Judge Bramwell requires all motions to be

returnable on a Friday at 10:00 A.M.

Very truly yours,

EDWARD R. KORMAN
United States Attorney

By: /s/ Richard H. Dolan
RICHARD H. DOLAN
Assistant U.S. Attorney

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
- X

ALBERT GUARINERI and ANN MARIE GUARINERI,

Plaintiffs,

-against-

Civil Action
No. CV 80-2295
(Bramwell, J.)

UNITED STATES OF AMERICA, etc.,

Defendants.

- X

The following is an oral memorandum decision from Judge Henry Bramwell, United States District Judge, Eastern District of New York.

(6) * * * *

THE COURT: Anything further, Mr. Dolan?

MR. DOLAN: Your Honor, I think in our brief we cite the cases that your Honor should consider.

THE COURT: I've gone over the papers and I've fully considered this motion, and I will put the Court's position on the record unless there's

anything further?

MR. DOLAN: No, your Honor.

MR. FALLETTA: No.

THE COURT: Okay.

The Plaintiffs, Albert and Ann Marie Guarineri, bring this action against the United States of America under the Federal Tort Claims Act of 1948. Plaintiffs contend that on September 18, 1978, Lloyd Jones and James Jonson, two prisoners participating in the "Federal Parole Work/Release (7) Program, shot and permanently injured Mr. Guarineri. Liability for this incident, plaintiffs argue, rests with the United States government for negligently releasing and thereafter failing to supervise Jones and Johnson. The United States opposes plaintiffs' suit with a motion to dismiss for lack of jurisdiction and alternately for failure to state a claim for relief.

First, I turn to defendants' claim of lack of jurisdiction.

The United States Supreme Court has consistently held that the United States, as soverign, can not be sued without its consent. Throughout the history of the United States, however, Congress has enacted legislation, creating various exceptions to the United States' privilege of sovereign immunity. In constructing this legislation, the Supreme Court has repeatedly held that any such exceptions or waivers must be narrowly construed. This narrow construction must now be applied to the present case.

Plaintiffs assert that the jurisdiction of this Court is based on 28 U.S.C. 1346b. That section empowers this Court to hear claims against the United States for negligent or wrongful acts (8) or

omissions caused by government employees, acting within the scope of their employment. Section 2675 of the same title, however, states when such jurisdiction becomes effective. Section 2675 states, and I quote, "An action shall not be instituted against the United States for money damages... unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency." The burden of establishing that this Court maintains subject matter jurisdiction over the instant action rests with the plaintiffs. The United States has submitted an affidavit from Mr. David Essig of the Bureau of Prisons stating that the agency has not received any administrative claim on plaintiff's behalf. Plaintiffs, in their memorandum of law, concede that they have not filed

a claim with the Bureau of Prisons. Plaintiffs contend, however, that their filing and service of the complaint in this present court action is sufficient to satisfy the statutory requirement of a preliminary administrative filing. This Court can not agree. In enacting Section 2675, Congress provided a well-defined, well-ordered claims procedure system. To allow (9) plaintiffs the right to designate their complaint as the equivalent of an administrative filing would be tantamount to allowing plaintiffs the right to substitute their own procedures for those enacted by Congress. In addressing precisely this issue, the 7th Circuit in Best Bearings v. United States, located at 463 F. 2d 1172, held, and I quote, "The language of Section 2675....is clear and unambiguous and phrased in mandatory

terms... The mere filing of a suit does not meet the requirements of Section 2675 of first presenting a claim to the appropriate federal agency." This Court adopts this position.

As an alternative, plaintiffs argue that their filing of a complaint in this action should toll the running of the statute of limitations on this claim. Again, however, this Court can not agree. Section 2401 clearly states, and I quote, "A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues." Plaintiffs did not meet this statutory requirement. In support of their position plaintiffs cite various federal court decisions (10)that have permitted an extension over the two year statutory allowance.

A careful reading of these cases, however, reveals that courts have allowed time extensions only when plaintiffs had originally filed an administrative claim within the statute of limitations but those claims proved, in various ways to be incomplete or defective. In this case, plaintiffs never filed an administrative claim. In Hammond v. United States, located at 388 F. Supp. 928, this court, per Judge Platt, rendered a strict interpretation of Section 2401. In accord with that decision, I find no merit in plaintiffs' second argument.

Accordingly, for the foregoing reasons, the United States' motion to dismiss for lack of jurisdiction is hereby Granted. Given the disposition of said motion, this Court need not address the United States' second motion to dismiss for failure to state a cause

of action. The parties are directed to settle an order in conformance with my decision today on or before January 22, 1981.

If you wish my decision, you can order a copy from the reporter.

MR FALLETTI: Thank you, your Honor.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- X

ALBERT GUARINERI and ANN MARIE GUARINERI,

Plaintiffs,

-against-

UNITED STATES OF AMERICA, etc.,

Defendants.

- X

FINAL JUDGMENT AND ORDER

Civil Action No. CV 80-2295 (Bramwell, J.)

This case having come on before the Court on January 9, 1981 on the defendants' motion to dismiss the complaint for lack of subject matter jurisdiction, and the defendants having appeared by EDWARD R. KORMAN, United States Attorney for this judicial district, RICHARD H. DOLAN, Assistant United States Attorney, of counsel, and plaintiffs having appeared by JAMES S. FALLETTA, ESQ. and the Court having carefully considered the papers and arguments submitted in support of

and in opposition to defendants' motion, and the Court having rendered a decision on the record granting defendants' motion to dismiss, and having afforded the parties a full opportunity to be heard on all matters, it is hereby

ORDERED, ADJUDGED and DECREED that defendants' motion to dismiss the complaint for lack of subject matter jurisdiction be, and the same hereby is, granted; and it is further

ORDERED, ADJUDGED and DECREED that the complaint herein be, and the same hereby is, dismissed.

This constitutes the final judgment and order of the Court in this case. The Clerk is directed to close the file on the case.

SO ORDERED.

Dated: Brooklyn, New York
January 22, 1981

/s/ Henry Bramwell
HONORABLE HENRY BRAMWELL
UNITED STATES DISTRICT JUDGE